

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 712 of 1989****For Approval and Signature:****HONOURABLE MR.JUSTICE C.K.BUCH**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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KAYYUMBHAI YUSUFBHAI SHAIKH - Appellant**Versus****STATE OF GUJARAT - Opponent(s)**

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Appearance :

MR.IMRAN H. PATHAN, FOR MR.MM TIRMIZI for Appellant
MR.A.J.DESAI, ADDL.PUBLIC PROSECUTOR for Opponent

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH**Date : 15/11/2006****ORAL JUDGMENT**

The present appeal arises out of the judgment and order of the learned Special Judge, City Civil Court, Ahmedabad passed in Special Criminal Case No.13 of 1989 on 7th November, 1989. The appellant came to be tried

for offences punishable under Section 3 read with Section 7 of the Essential Commodities Act, 1955, so also, he was found guilty for violating the provision of Kerosene (Restriction on Use) Order, 1966 by the trial Court and came to be convicted therefor. The learned trial Judge after recording conviction and after hearing the accused on quantum of punishment, sentenced the accused-appellant to undergo Rigorous Imprisonment for 03 (three) months.

2. The facts of the case can be stated thus:-

3. The complainant was discharging his duty as Traffic Police Sub Inspector at S.T. Circle between 5:00 p.m. and 9:00 p.m. At that time, some other Police Officers, so also, the expert persons of Forensic Science Laboratory were also present with him. It is the case of the prosecution that one rickshaw came from Paldi which was emitting excessive smoke and therefore, it was intercepted by the complainant and rickshaw was stopped. However, the rickshaw driver ran away from the spot. Thereafter, the sample of fuel was taken from the fuel tank of the rickshaw by the Police in the presence of Panch. On preliminary analysis done by the F.S.L. persons, it was found that the kerosene was mixed with the fuel recovered from the tank of the rickshaw.

Thereafter, the adequate sample of fuel was taken in a bottle from the tank of the rickshaw in a sealed bottle and signatures of the complainant and Panchwitnesses were also obtained. On detailed analysis, the expert of the F.S.L. found that the sample which was taken from the tank of rickshaw was mixed with kerosene-hydrocarbons. In the meantime, the owner of the rickshaw was informed and on 3/10/1988 he had presented the rickshaw driver. The Police had arrested him. Offence was registered and case was investigated. Ultimately, the Investigating Agency, having found sufficient material to connect the accused-appellant with the crime, filed charge-sheet.

4. After considering the evidence led by the prosecution, the Special Court came to a conclusion that the prosecution was successful in establishing charges levelled against the appellant and therefore, convicted the accused-appellant for the said offence by the impugned judgment dated 7th November, 1989 passed in Special Criminal Case No.13 of 1989. It is this judgment and order that has given rise to this appeal.

5. Learned Advocate, Mr.Imran H. Pathan, for Mr.M.M.Tirmizi represents the appellant. Learned A.P.P., Mr.A.J.Desai represents the State.

6. Record and proceedings are before me and I have been taken through the same by both the sides during the course of hearing.

7. Learned Advocate, Mr.Pathan, has submitted that the accused has not been accorded proper opportunity to cross-examine the witnesses. The learned trial Judge ought to have given some time so that the accused could have arranged some other advocate. He also submitted that the learned trial Judge could have arranged a Counsel from Legal Aid. Mr.Pathan, has submitted that the accused-appellant is a poor rickshaw driver, which was evident from the fact that he was driving the rickshaw of the original owner. The original rickshaw owner also belongs to lower strata of society. The absurdity on the part of the trial Court has resulted into the conviction of the appellant, otherwise he could have been acquitted like the other accused who has been acquitted at the conclusion of the trial on similar set of facts.

8. Learned Advocate, Mr.Pathan has further submitted that there are material contradictions and it is doubtful that the Panchas were present when the

rickshaw was stopped by the complainant. It is the case of the prosecution that Panchas were also present before the rickshaw was stopped. Against this, the Panchas have stated that rickshaw was already lying there when they were called upon and only the sample was taken from the fuel tank of the rickshaw in their presence. Mr.Pathan, has submitted that these contradictions should be treated as material contradictions and appellant-accused should be given the benefit of doubt.

9. Mr.Pathan has further submitted that the owner of the rickshaw has deposed before the Court that appellant-accused was driving the rickshaw as driver and therefore, accused being driver should not be held responsible for poor quality of the fuel which was recovered from the rickshaw. In support of this argument, Mr.Pathan has placed reliance on decision in case of **Abdul Jabbar s/o Abdul Sattar Vs. State of Maharashtra, reported in 1995 CRI.L.J. 3446** wherein, the Bombay High Court acquitted the accused from similar charge. In this decision the motor truck was intercepted and stopped for using kerosene as fuel allegedly mixed with diesel. The Bombay High Court observed that the prosecution is supposed to prove the knowledge of the driver about the presence of the kerosene in the fuel and in absence of

such evidence, the driver of the motor truck should not be held responsible. The owner is the person who was responsible for the fuel used in the vehicle.

10. Mr.Desai, learned A.P.P., on the other hand submitted that the Court should see the proceeding. The number of opportunities were given to the accused and in such case on the actual date of trial, the Presiding Judge could not arrange for an advocate who can render legal aid to the accused. Mr.Desai has further submitted that in view of the observations made by the trial Court with regard to the proceeding, as well as, the depositions of the prosecution witnesses, the conviction cannot be turned down or in the alternative he has submitted that the matter should be sent back for retrial. He has also submitted that in the present case, the report of the F.S.L. is a conclusive proof as to use of kerosene. This is not a case of mixture of kerosene with any other fuel like diesel or petrol. The F.S.L. Report has in terms opined that kerosene-hydrocarbons was found with lubricants oil. In such a situation, it should not be accepted that accused was not knowing about the quality of fuel which was being used when he was driving the auto-rickshaw. The prosecution is supposed to prove the actual use of kerosene where the percentage of

kerosene is very limited or if it is found that the knowledge as to use of kerosene while preparing the mixture would become relevant and therefore, the decision of the Bombay High Court is not helpful to the appellant-accused.

11. The backbone of the argument of Mr.Desai is logical when it is not the say of the appellant-accused that rickshaw was handed over to him when the tank was already fueled and on the contrary it is his contention that the conduct of the accused to run away from the spot was required to be considered and it has rightly been considered by the trial Court. The depositions of the Police Sub Inspector and Panchas in absence of cross-examination were required to be appreciated and they have been correctly appreciated.

12. After reading the entire set of evidence, oral as well as documentary, Mr.Pathan, has fairly submitted that he may not press appeal qua the recording of conviction. However, he submitted to consider whether the accused can be granted the benefit under the Probation of Offenders Act or can be given the benefit under Section 360 and 361 of the Code of Criminal Procedure, 1973.

13. Even, today this Court should think to grant benefit under Section 360 read with Section 361 of the Code of Criminal Procedure, 1973, because after laps of about 20 years the appellant-accused should not be asked to go to serve the sentence of three months. It is true that in the Statute minimum sentence is prescribed but there is no bar in granting benefit under Section 360 read with Section 361 of the Code of Criminal Procedure, 1973. In support of his this contention, Mr.Pathan has relied upon the decision of this Court in case of (The) State of Gujarat Vs. Ganpatbhai Premjibhai Joshi, reported in 1998 (2) G.L.H. 787. The paragraph 6 of the said judgment is stated thus:-

"6. Under the circumstances, even the provision for minimum punishment will not come in the way because benefit of probation has to be given to the offenders under the provisions of all other Statutes providing for penal offences unless they are specifically excluded either in the Statute itself or under the provisions of the said Probation in relation to the offences under Essential Commodities Act, obviously, the decision taken by the Ld. Spl. Judge cannot be said to be, in any manner, wrong."

14. According to Mr.Desai, in essential commodities cases, the Court should not take liberal view otherwise the system of civil supply would get disturbed and in

number of cases such requests have been turned down by this Court.

15. This Court has considered the various aspects. It should not leave the sight of that accused was the driver. He was not even having his own rickshaw. In those days, the Government was very strict in regulating the supply of use of kerosene being essential commodities. When this Court has observed earlier that minimum punishment by itself would not be a bar in giving benefit of probation, this Court is inclined to exercise discretion in favour of the appellant-accused because sentencing the accused and asking him to go in jail after lapse of about 20 years, when the punishment imposed by the trial Court is only three months. The Court is aware that protraction of proceeding by the trial Court or the appeal or hearing of the appeal by itself would not make the accused entitle to have a liberal view in his favour. In the offences of moral turpitude or heinous crime, the approach of the court should be of some deterrence. This is not a case of seizure of kerosene or any other essential commodity in large quantity; nor it is a case where an industrialist is found using kerosene without permission for the purpose other than permitting authorization.

16. Similar view was taken by the Punjab & Haryana High Court in case of **Joginder Singh Vs. the State of Punjab, reported in 1980 CRI. L.J. 1218** wherein it was observed thus:-

“though the sentencing process is an integral part of the trial, this would not in any way affect the issue of the applicability of Section 360 and 361 of the Criminal Procedure Code, 1973 to the sentencing process. Therefore, even though a special act may provide the sentence for offence whether fixing a minimum therefor or otherwise, this would be no reason for saying that these provisions of the Code would be excluded or be inapplicable.

17. The Rajasthan High Court in case of **Jatan Singh Vs. State of Rajasthan reported in 1995 (3) Crimes 773,** where Police had recovered 12 bore country made pistol and the accused was convicted under Section 25 (IB) (a) of the Arms Act, also approved grant of such benefit under the provisions of Probation of Offenders Act. Of course, the accused had remained in jail for one and half months. In the said decision the Court while granting the advantage of Probation has observed thus:-

“I have given my thoughtful consideration to the rival contentions. The Arms Act, 1959 does not exclude the application of provisions of Section

360, Cr.P.C. as well as those of provisions under Probation of Offenders Act, 1959. In Jugta Ram vs. State of Rajasthan it has been held that unless any Act excludes the applicability of Section 360 of Criminal Procedure Code or the provision of Probation of Offenders Act, the mere fact that a minimum sentence has been prescribed for any offence, is not sufficient to refuse beneficiary probation. It was further observed that its application, however, depends on the facts of each case as to whether such benefit should be extended to the accused or not. This is trite law that mere prescribing of minimum sentence for a particular offence does not create any bar for extending the benefit of probation, either under Section 360 of Criminal Procedure Code or under the Probation of Offenders Act in a particular case. A similar view has been taken in Pidar Singh Vs. State of Rajasthan."

18. In the result, present appeal is partly allowed. While confirming the judgment and order of conviction passed by the learned Special Judge, City Civil Court, Ahmedabad in Special Criminal Case No.13 of 1989, the appellant-accused is given the benefit of probation under Section 360 read with Section 361 of the Criminal Procedure Code, 1973, instead of asking him to serve the sentence. The appellant-accused is directed to execute a bond of good behaviour with one surety of Rs.5,000/- for a period of one year under the scheme of

Section 360 read with Section 361 of Criminal Procedure Code, 1973. The appellant-accused is also directed to execute a personal bond of Rs.5,000/- before the trial Court within 30 days from today, failing which the trial Court shall issue non-bailable warrant for arrest of the appellant-accused and he will be liable to serve the sentence imposed upon him by the trial Court. He shall also be liable to serve the sentence in event of breach of conditions of the bond executed for good behaviour. Bail Bond of the accused-appellant stands cancelled.

(C.K.BUCH, J.)

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